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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 583

JOHN COLEMAN,

Petitioner,

—v.—

ALABAMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Alabama is not yet reported and may be found in the printed record, pp. 28-34.

Jurisdiction

The judgment of the Supreme Court of Alabama affirming judgment of conviction and sentence to death was entered May 9, 1963 (R. 35) and application for rehearing was denied June 20, 1963 (R. 37). Petition for writ of certiorari was filed in this Court September 17, 1963 and granted October 28, 1963 (R. 38).

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Code of Alabama, Title 15, §382(10) (1958):

> *Hearing and determination in appellate court.*
>
> In all cases of automatic appeals the appellate court may consider, at its discretion, any testimony that was seriously prejudicial to the rights of the appellant, and may reverse thereon even though no lawful objection or exception was made thereto. The appellate court shall consider all of the testimony and if upon such consideration is of opinion the verdict is so decidedly contrary to the great weight of the evidence as to be wrong and unjust and that upon that ground a new trial should be had, the court shall enter an order of reversal of the judgment and grant a new trial, though no motion to that effect was presented in the court below.

Question Presented

Whether petitioner, a Negro under sentence of death, was denied rights under the due process and equal protection clauses of the Fourteenth Amendment when:

(1) the trial court refused to permit introduction of proof establishing systematic exclusion of Negroes from grand and petit juries on the ground that petitioner had waived his constitutional rights by failure to raise them prior to arraignment and trial; and

(2) the Supreme Court of Alabama ignored this alleged waiver and affirmed on the ground that petitioner was given opportunity to introduce proof of systematic exclusion and did not introduce sufficient proof?

Statement

Petitioner, a Negro, was indicted, tried, and convicted[1] of the murder of a white man by juries of Greene County, Alabama, and sentenced to death[2] (R. 1-3).

Because of indigence, petitioner was represented by court appointed counsel, Thomas F. Seale, a member of the white race, at arraignment and trial (R. 1, 3, 5, 33). Subsequent to conviction, Seale was appointed to prosecute an appeal to the Supreme Court of Alabama (R. 7). At no time did Mr. Seale make any attempt to assert petitioner's constitutional right to grand and petit juries chosen without systematic exclusion of the members of the Negro race (R. 18).

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[1] The facts with respect to the killing and petitioner's connection with it are summarized in the opinion of the Supreme Court of Alabama (R. 28-31). Conviction and sentence rested on circumstantial evidence alone. The deceased, a screw driver clutched in his hand, was found dead of a shotgun wound. There were no witnesses to the shooting. The gun which caused death was never found. The prosecution sought to link petitioner to a burglary where shotgun and shells of the same brand as those causing death were stolen. Clothing in petitioner's possession was the same type as that taken from the burglarized store. A piece of minnow net found near decedent's house matched a larger piece found on a farm where petitioner had worked, and a shirt, claimed to belong to petitioner, contained particles similar to those found on unused shotgun shells at the scene of the killing. The shirt also lacked a button which, according to the State Toxicologist, was the same as a button found at the scene of the burglary. Petitioner denied ownership of the shirt and claimed he was traveling to Cleveland, Ohio, to visit his wife at the time the killing occurred.

[2] The jury imposed the death penalty. See R. 24 and Code of Alabama, Tit. 14 §318 (1958).

Subsequent to conviction and sentence, a Negro attorney entered the case in petitioner's behalf. He filed timely motion for new trial urging, for the first time, that Negroes had been systematically excluded from the grand and petit juries in violation of the Fourteenth Amendment to the Constitution of the United States (R. 9-11), and later filed an amendment to the motion for new trial, alleging that a new trial should be granted because of "newly discovered evidence" as shown by an attached affidavit of petitioner's mother (R. 12). This affidavit stated that petitioner was indicted by a grand jury composed of eighteen white men and tried by a petit jury composed of twelve white men and that affiant "was informed" after her son's conviction that "no Negroes, or only a mere token, have been summoned for jury duty in Greene County, Alabama, in spite of population ratio of the two races in modern times." The amendment asked the court to take notice of the motion for new trial and "after consideration of the evidence and proof which the defendant offers to make, grant said motion" (R. 12).

The trial court considered the motion for new trial and amendment at a hearing held June 1, 1963 (R. 15-23). At the outset, the state moved to strike the amendment, including the affidavit, on the ground, *inter alia,* that the amended motion was not germane to the original motion for new trial, there being nothing "about any newly discovered evidence" in the original motion for new trial (R. 16). The trial court granted the motion (R. 17) despite the fact that the "newly discovered evidence" pertained to systematic exclusion from the juries, an issue raised by the original motion for new trial (R. 9-11).

The court then considered the motion for new trial. Petitioner's counsel sought to introduce evidence that Negroes were systematically excluded from the grand jury which

indicted and the petit jury which tried, convicted, and sentenced, by attempting to call as witnesses the two Circuit Solicitors who had served as prosecuting attorneys at petitioner's trial (R. 17). But the state took the position that objections to the grand and petit juries based on exclusion of Negroes "cannot be raised for the first time on motion for new trial" (R. 18). At this point, petitioner's counsel asked to be permitted "to make an offer of what I intend to show" (R. 17), but the court refused, stating it would only hear argument on the law (R. 19).

The court indicated, however, that petitioner's counsel might place the two Circuit Solicitors on the stand and propound questions to them "and if an objection is raised, then the Court will rule upon it" (R. 19). Thomas H. Boggs, Solicitor of the 17th Judicial Circuit of the State of Alabama, which includes Greene County, was called (R. 20). He was permitted to testify that he had been present at every grand jury held in the county for the last 17 years and that he had a wide acquaintance among whites and Negroes in the County (R. 20, 21). However, when he was asked whether the ratio of Negroes to whites in Greene County was four to one,[3] the trial court sustained an objection on the ground that "you cannot go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto" (R. 22). Once the trial court expressed this opinion, counsel sought only "to get one or two of these questions in the record for the purpose of taking an exception" (R. 22). Mr. Boggs was not permitted to answer additional questions seeking to establish systematic exclusion

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[3] According to the 17th Decennial Census, Final Report, P. C. (1) 2B, Alabama, p. 81, Greene County has a total population of 13,600, of whom 2,546 persons are white and 11,504 are non-white. There are 775 white males and 2,247 non-white males (the total 21 years of age and over) eligible for jury service. Code of Alabama, Tit. 30, §21 (1958).

on the same ground that the issue should have been raised prior to indictment and trial and could not be considered when raised by motion for new trial (R. 22-23).[4] The motion for new trial was denied (R. 23).

Petitioner appealed directly from judgment of conviction and sentence of death to the Supreme Court of Alabama pursuant to the Alabama automatic appeal statute, Code of Alabama, Tit. 15, §§382(1)-(13) (1958), which provides for

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[4] Attorney for Defendant: I can ask whether or not the law was complied with?

Court: Yes. The fact that the law was complied with; that is a general question, but the Court will sustain an objection to that because the courts have held repeatedly, the Supreme Court of Alabama and the Supreme Court of the United States, that you can not go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto. That is the reason I asked you the question before. The case was tried by Mr. Boggs and the Court is familiar with it.

Attorney for Defendant: But I would like to get one or two of these questions in the record for the purpose of taking an exception to it.

Court: You may ask the questions, but the Court will have to sustain an objection to them.

Q. Mr. Boggs, you were present when the Grand Jury, which indicted Johnny Coleman, was convened, were you not?

A. I was.

Q. How many persons were on that grand jury?

A. Eighteen.

Q. Were any negroes on that grand jury?

Solicitor: I object to that, may it please the Court. It is an illegal mode of raising that which should have been raised by motion to quash the indictment.

Court: Sustain the objection.

Attorney for Defendant: I want to ask one more question, and then I won't have any further question to ask—two more, your Honor.

Q. Were there any negroes on the petit jury that tried this defendant?

Solicitor: I object to that, may it please the Court, on the ground that it should have been properly raised by motion to quash the venire if the Fourteenth Amendment was to be taken advantage of in this matter.

Court: Sustain the objection.

direct appeal from the trial court in capital cases (R. 28). The Supreme Court of Alabama has a "duty" where such an appeal is taken "to examine all the evidence for reversible error without the necessity of seasonable objection" (R. 34).

The Supreme Court, in affirming, did not discuss whether the failure of petitioner's court appointed counsel to object to exclusion of Negroes from the juries, prior to arraignment and trial, acted as a waiver of petitioner's constitutional rights although the court found generally "nothing in the record to indicate inadequacy or incompetence" on the part of counsel (R. 33). The manner in which the court disposed of the appeal, however, completely put to one side the question of alleged waiver, for, after determining that petitioner "was given an opportunity on the hearing of the motion for a new trial to adduce evidence of any systematic exclusion" (R. 32), the court held there was "no sufficient proof" to establish systematic exclusion of Negroes from grand and petit juries (R. 32, 33). The Supreme Court stressed that "the burden of proof was upon the defendant to establish the alleged racial discrimination," and found, "There was no evidence in the record of the population of the two races nor of the ratio of properly qualified Negroes as compared to properly qualified whites. The transcript is completely devoid of any proof whatsoever tending to support appellant's allegation" (R. 32, 33).

The Supreme Court of Alabama denied application for rehearing June 20, 1963 (R. 37).

ARGUMENT

Petitioner Was Denied Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment When Denied an Opportunity to Introduce Evidence Establishing Systematic Exclusion of Negroes From the Grand and Petit Juries.

This Court has a duty to determine independently facts or constructions upon which federal constitutional issues rest, see e.g., *Napue* v. *Illinois,* 360 U. S. 264, 272. "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded," *Niemotko* v. *Maryland,* 340 U. S. 268, 271.

The Supreme Court of Alabama found petitioner "was given an opportunity at the hearing on motion for new trial to adduce evidence of any systematic exclusion" (R. 32) from the grand jury which indicted and petit jury which tried him. Reasoning from this premise, the court affirmed petitioner's conviction and sentence to death on the ground that he had not introduced sufficient proof of systematic exclusion of Negroes to meet the burden of proof imposed upon him to establish his Fourteenth Amendment claim (R. 32, 33).

Far from establishing, however, that petitioner was accorded an opportunity to present proof of systematic exclusion, the record shows clearly that persistent attempts to develop such evidence were thwarted repeatedly by rulings of the trial judge.

Subsequent to conviction, a Negro attorney entered the case for petitioner, and moved for a new trial on the ground,

inter alia, that Negroes were systematically excluded from the grand and petit juries (R. 10, 11).[5] At the outset of the hearing held on the motion for new trial, the court struck an amendment to the motion for new trial which incorporated an affidavit of petitioner's mother stating that her son was indicted by an all-white grand jury and tried by an all-white petit jury from which Negroes were systematically and intentionally excluded (R. 13). This affidavit was struck apparently on the ground that it was not "germane to the original motion" for new trial (R. 16), a conclusion unsupported by the record as both the affidavit and the motion for new trial claimed systematic exclusion of Negroes from juries (R. 10, 11, 13).

At this point, petitioner's counsel sought to call as witnesses the two Circuit Solicitors who had served as prosecuting attorneys at petitioner's trial (R. 17). The State objected on the ground that systematic exclusion cannot "be raised for the first time on motion for new trial," relying on *Ball v. State*, 252 Ala. 686, 42 So. 2d 626, a Supreme Court of Alabama decision announcing such a rule (R. 18).[6] Petitioner's counsel asked if he could "make an offer of what I intend to show" (R. 19), but the court indicated the proper procedure would be to have "Mr. Boggs and Mr.

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[5] The failure of petitioner's white court appointed counsel to raise the jury discrimination issue corroborates the conclusion of the United States Court of Appeals for the Fifth Circuit that white lawyers in the south "rarely, almost to the point of never, raise the issue of systematic exclusion." *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, 81 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 68 (5th Cir. 1962).

[6] Alabama law requires objections to systematic exclusion of Negroes from the grand jury be raised by plea in abatement before defendant enters a plea to the merits and objections to the petit jury venire be raised before entering upon trial. Failure to object at proper times acts as a waiver. *Ball* v. *State*, 252 Ala. 686, 42 So. 2d 626, cert. den. 339 U. S. 929; Code of Ala., Tit. 15, §§ 278, 279 (1958).

Banks sworn and placed upon the stand and you may propound the questions to them if you care to do so; and if an objection is raised, then the Court will rule upon it" (R. 19).

Petitioner's counsel called Solicitor Thomas H. Boggs as a witness. He was permitted to testify that he was always present when the Greene County grand jury was convened, and that he had a wide acquaintance among both Negroes and whites in the county. When asked about the population ratio between Negroes and whites in the county, he stated that there were many more Negroes than whites. But when he was asked, "Whether in your best judgment you think it would be four to one?" (R. 21), objection was sustained for the reason "that you cannot go into those matters unless they have been raised properly" (R. 22). After this ruling, petitioner's counsel attempted only "to get one or two of these questions in the record for the purpose of taking an exception" (R. 22). The trial court again sustained objections on the ground that the jury issue was not properly raised on motion for new trial (R. 22, 23).

Totally unsupported, then, is the finding of the Supreme Court of Alabama that petitioner "was given an opportunity on the hearing of the motion for new trial to adduce evidence of any systematic exclusion" (R. 32). The trial judge, at the urging of the attorney for state, ruled that "you can not go into those matters unless they have been raised properly during the trial or in some proceedings prior thereto" (R. 22), and he sustained objections to questions which sought to establish the population ratio of the races in Greene County (R. 21) and the absence of Negroes from grand jury and petit jury (R. 22). The failure of the trial court to permit petitioner to establish the population ratio between the races in Greene County is especially significant, for the Supreme Court of Alabama affirmed, in part, on the

ground that there was no evidence of population ratio (R. 32).

As petitioner was denied an opportunity to develop evidence of violation of his constitutional rights, his conviction cannot be affirmed on the ground that he has not introduced "sufficient proof" to meet his "burden of proof" (R. 32, 33), for such a result would make a mockery of the constitutional right to equal protection of the laws which he claimed. *Carter* v. *Texas*, 177 U. S. 442.[7]

The hearing accorded petitioner did not meet the standards of the due process clause. Such a hearing "includes the right to introduce evidence and have judicial findings based upon it." *Baltimore & O. R. Co.* v. *United States*, and cases cited, 298 U. S. 349, 368, 369, 369n.28, 29; *Re Oliver* and cases cited, 333 U. S. 257, 273, 273n.31, 275; cf. *Lombard* v. *Louisiana*, 373 U. S. at 255 (Justice Harlan dissenting). Nor is due process satisfied when an appellate court considers such evidence of systematic exclusion as may be in a record if petitioner has had no opportunity to make a full presentation of proof. *Cole* v. *Arkansas*, 333 U. S. 196.[8]

The State of Alabama, in its Brief in Opposition to Certiorari, argued as if petitioner were seeking to invali-

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[7] In the *Carter* case, this Court reversed the judgment of a state court which held that a Negro claiming systematic exclusion from the grand jury had not "presented to the court . . . any evidence whatever in support of it," 177 U. S. at 446, on the ground that the defendant "offered to introduce witnesses to prove the allegations . . . and the court . . . declined to hear any evidence upon the subject." 177 U. S. at 448, 449.

[8] This is especially true in light of the Supreme Court of Alabama's refusal to consider all of the evidence available. In his brief petitioner asked the Supreme Court to take judicial notice of U. S. Census population figures for Greene County (see note 3, *supra*) but the Court refused, holding that there was no evidence of population figures.

date the Alabama rules of law which require that objection to formation of the grand jury be made prior to entering a plea to the indictment and that objection to the petit jury venire be made before trial, or else that such objections are considered waived.[9] Petitioner, however, has not attacked the reasonableness of these procedural requirements for the reason that the Supreme Court of Alabama did not choose to rest its affirmance on the ground of waiver, but, as it has done in similar cases in the past, *Clark* v. *State*, 239 Ala. 380, 195 So. 260, cert. denied 311 U. S. 688,[10] clearly and unmistakably rested its decision on the ground that petitioner did not introduce sufficient proof of systematic exclusion (R. 32, 33).[11]

The opinion of the Supreme Court suggests that the court chose to ignore the failure to raise the question of systematic exclusion because the case came to that court under the automatic appeal statute, cf. *Arrington* v. *State*, 253 Ala. 178, 182, 43 So. 2d 644, 648, where the duty of the court is "to examine all evidence for reversible error without the necessity of seasonable objection" (R. 34). But the reason that the Supreme Court of Alabama put the waiver rule to one side and decided the case as it did are

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[9] See note 6, *supra*.

[10] In *Clark* v. *State*, *supra*, the Supreme Court of Alabama found "without regard to the tardiness in presenting the question of the exclusion of qualified persons of the Negro race . . . we may say that the evidence offered in support of this contention by the defendant fails to show . . . [Negroes were] systematically or arbitrarily excluded." 239 Ala. 380, 386, 195 So. 260, 264.

[11] As the Supreme Court of Alabama did not treat the constitutional rights asserted as being waived but on the contrary ruled they were not established by evidence, petitioner has made no attempt to argue that a white, court appointed, lawyer in Alabama could not effectively waive such constitutional rights. See *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, 81 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman*, 304 F. 2d 53, 68 (5th Cir. 1962). Cf. *Michel* v. *Louisiana*, 350 U. S. 91.

not relevant here. Where the highest court of a state holds a federal question is properly before it and then proceeds to consider and dispose of that issue, this Court is no longer concerned with whether a litigant has complied with the proper state procedures for raising the question. *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134; *Whitney* v. *California,* 274 U. S. 357, 360-1; *Raley* v. *Ohio,* 360 U. S. 423, 436.

Petitioner was denied an opportunity to introduce proof of systematic exclusion of Negroes from the grand and petit juries when absence of such proof served to affirm his conviction. In this, he has been denied basic procedural fairness, and rights he sought to assert have been unconstitutionally abridged.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner prays this Court reverse the judgment of the court below.

Respectfully submitted,

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